

(4 November 2016 – to date)

## **ELECTRICITY REGULATION ACT 4 OF 2006**

*Government Notice 660 in Government Gazette 28992, dated 5 July 2006. Commencement date: 1 August 2006 – unless otherwise indicated [Proc. R30, Gazette No. 9057, dated 21 July 2006].*

## **ELECTRICITY REGULATIONS ON NEW GENERATION CAPACITY**

*Government Notice R399 in Government Gazette 34262, dated 4 May 2011. Commencement date: 4 May 2011.*

### **As amended by:**

*Government Notice R1366 in Government Gazette 40401 dated 4 November 2016. Commencement date: 4 November 2016.*

I, Dipuo Peters, Minister of Energy, hereby under section 35(4) of the Electricity Regulation Act, 2006 (Act No. 4 of 2006), make the regulations in the Schedule.

## **SCHEDULE**

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### **1. Definitions**

In these Regulations, any word or expression to which a meaning has been assigned in the Act, shall have the meaning so assigned and, unless the context otherwise indicates -

Prepared by:

**“ancillary services”** .....

*(Definition of “ancillary services” deleted by regulation 2(a) of Government Notice R1366 in Government Gazette 40401 dated 4 November 2016)*

**“buyer”** means, in relation to a new generation capacity project, any organ of state designated by the Minister in terms of section 34(1)(c) and (d) of the Act;

**“cross border project”** means a new generation capacity project in respect of which the generation facility is situated outside of the Republic;

**“existing generation facilities”** means generation facilities that are in operation on or immediately prior to the date of the relevant determination in terms of section 34(1) of the Act;

*(Definition of “existing generation facilities” substituted by regulation 2(b) of Government Notice R1366 in Government Gazette 40401 dated 4 November 2016)*

**“Eskom”** means Eskom Holdings Limited contemplated in section 3(1) of the Eskom Conversion Act, 2001 (Act No. 13 of 2001);

**“Government”** means the Government of the Republic;

**“Independent Power Producer”** or **“IPP”** means any person in which the Government or any organ of state does not hold a controlling ownership interest (whether direct or indirect), which undertakes or intends to undertake the development or creation of new generation capacity pursuant to a determination made by the Minister in terms of section 34(1) of the Act;

*(Definition of “Independent Power Producer” or “IPP” substituted by regulation 2(c) of Government Notice R1366 in Government Gazette 40401 dated 4 November 2016)*

**“interconnected distribution power system”** means a distribution power system that is interconnected to a transmission power system either directly or through interconnection to another distribution power system where the latter system is directly or indirectly interconnected to a transmission power system;

*(Definition of “interconnected distribution power system” inserted by regulation 2(d) of Government Notice R1366 in Government Gazette 40401 dated 4 November 2016)*

**“IPP procurement programme”** means a procurement process undertaken for the procurement of new generation capacity from IPPs;

**“Minister”** means the Minister of Energy;

**“National transmission company”** or **“NTC”** means the person licensed to execute the national transmission responsibility, in its capacity as such, including the transmission network service provider which maintains and develops the transmission network, but excluding the system operator;

**“national transmission power system”** means the interconnected transmission power system used for the supply of electricity to customers across the territory of the Republic;

*(Definition of “national transmission power system” inserted by regulation 2(e) of Government Notice R1366 in Government Gazette 40401 dated 4 November 2016)*

**“National Treasury”** means the National Treasury established by section 5 of the Public Finance Management Act, 1999 (Act No. 1 of 1999);

**“new generation capacity”** means electricity or electricity capacity sold or made available, or generation capacity connected, to the national transmission power system or an interconnected distribution power system, pursuant to a determination in terms of section 34(1) of the Act, which is derived from—

- (a) new generation facilities;
- (b) an expansion of existing generation facilities;
- (c) existing generation facilities not previously supplying electricity to the national transmission power system or an interconnected distribution power system;
- (d) existing generation facilities through an extension of any existing agreement for the purchase of electricity capacity or electricity for an additional supply period to be defined in the power purchase agreement, or through entering into a new power purchase agreement for a supply period to be defined in terms of such new power purchase agreement; or
- (e) demand side reduction measures, including aggregation, management of demand side reduction, or energy efficiency measures;

*(Definition of “new generation capacity” substituted by regulation 2(f) of Government Notice R1366 in Government Gazette 40401 dated 4 November 2016)*

**“new generation capacity project”** means a project for the development of new generation capacity pursuant to a determination made by the Minister in terms of section 34 of the Act;

**“new generation facilities”** means generation facilities that are in operation on or immediately after the date of the relevant determination in terms of section 34(1) of the Act;

*(Definition of “new generation facilities” inserted by regulation 2(h) of Government Notice R1366 in Government Gazette 40401 dated 4 November 2016)*

**“organ of state”** bears the meaning ascribed to it in section 239 of the Constitution;

**“Peaker Project”** means the new generation capacity project to establish generation facilities at Avon in the Kwazulu Natal Province and Dedisa in the Eastern Cape Province;

**“power purchase agreement”** or **“PPA”** means an agreement for the sale and purchase of new generation capacity;

*(Definition of “power purchase agreement” or “PPA” substituted by regulation 2(i) of Government Notice R1366 in Government Gazette 40401 dated 4 November 2016)*

**“procurer”** means the person designated by the Minister in terms of section 34 as being responsible for the preparation, management and implementation of the activities related to procurement of new generation capacity under an IPP procurement programme including the negotiation of the applicable power purchase agreements, which person may or may not be the buyer;

**“Public Finance Management Act”** means the Public Finance Management Act, 1999 (Act No. 1 of 1999);

**“seller”** means a person who concludes a power purchase agreement with a buyer in terms of which such person undertakes to sell or make available new generation capacity to the buyer;

*(Definition of “seller” inserted by regulation 2(j) of Government Notice R1366 in Government Gazette 40401 dated 4 November 2016)*

**“system operator”** means the person responsible for short-term reliability of the interconnected power system, which is in charge of controlling and operating the transmission power system and dispatching generation facilities (or balancing the supply of and demand for electricity) in real time, in its capacity as such;

**“the Act”** means the Electricity Regulation Act, 2006 (Act No. 4 of 2006);

**“value for money”** means that the new generation capacity project results in a net benefit to the prospective buyer or to Government having regard to cost, price, quality, quantity, risk transfer or a combination thereof, but also where applicable to the Government’s policies in support of renewable energy.

## **2. Application of the Regulations**

- (1) These Regulations apply to the procurement of new generation capacity, by organs of state, including -
  - (a) new generation capacity derived from renewable energy sources and co-generation;
  - (b) base load, mid-merit load and peak load new generation capacity; and
  - (c) cross border projects,

but excluding new generation capacity derived from nuclear power technology.

- (2) These Regulations do not apply to the purchase of new generation capacity by persons other than organs of state.

*(Regulation 2(2) substituted by regulation 3 of Government Notice R1366 in Government Gazette 40401 dated 4 November 2016)*

### **3. Objectives of the Regulations**

The objectives of these Regulations are -

(a) to facilitate planning for the establishment of new generation capacity;

(b) the regulation of entry by a buyer and a seller into a power purchase agreement;

*(Regulation 3(b) substituted by regulation 4 of Government Notice R1366 in Government Gazette 40401 dated 4 November 2016)*

(c) to set minimum standards or requirements for power purchase agreements;

(d) the facilitation of the full recovery by the buyer of all costs efficiently incurred by it under or in connection with a power purchase agreement including a reasonable return based on the risks assumed by the buyer thereunder and to ensure transparency and cost reflectivity in the determination of electricity tariffs; and

(e) the provision of a framework for implementation of an IPP procurement programme and the relevant agreements to be concluded.

### **4. Planning for new generation capacity**

- (1) The integrated resource plan shall -

(a) be developed by the Minister after consultation with the Regulator; and

(b) be published in the Government Gazette by the Minister.

- (2) The system operator, the NTC and the Regulator shall timeously provide such assistance as the Minister may require for purposes of developing and monitoring the implementation of an integrated resource plan.

- (3) The Regulator shall, after consultation with the Minister, the system operator and the NTC, make rules relating to the keeping of relevant information, the submission of such information and the rendering of returns by licensees, as required in order to facilitate integrated resource planning.

## **5. Feasibility studies**

- (1) Having regard to the need for new generation capacity as provided for in the integrated resource plan, the Minister may undertake or commission the buyer or another party to undertake feasibility studies in respect of such new generation capacity requirement.
- (2) The following shall form part of the considerations and outcomes for a feasibility study undertaken pursuant to a decision in terms of sub-regulation (1) -

- (a) the anticipated cost of the proposed new generation capacity;

- (b) the proposed allocation of financial, technical and operational risk between the prospective buyers and the seller, and between the seller and the NTC or the distributor, as the case may be;

*(Regulation 5(2)(b) substituted by regulation 5(a) of Government Notice R1366 in Government Gazette 40401 dated 4 November 2016)*

- (c) the demonstration of the anticipated value for money to be achieved through the new generation capacity project;

- (d) the material legal, financial and technical requirements including consents that will be required in order to procure the new generation capacity; and

- (e) whether the appropriate seller should be Eskom as part of its services as the national electricity producer, another organ of state or an IPP.

*(Regulation 5(2)(e) substituted by regulation 5(b) of Government Notice R1366 in Government Gazette 40401 dated 4 November 2016)*

## **6. Ministerial determinations**

- (1) The Minister may, in consultation with the Regulator, make a determination in terms of section 34 of the Act.
- (2) A determination under section 34(1) shall include a determination as to whether the new generation capacity shall be established by Eskom, another organ of state or an IPP.
- (3) If the determination referred to in sub-regulation (2) requires that the new generation capacity be established by an IPP, the Minister shall also determine the identity of the buyer or, where applicable, the procurer and the buyer.

- (4) The determination referred to in sub-regulation (2) may require or contemplate that new generation capacity be established through a cross border project, provided that the Minister is satisfied that adequate agreements, memoranda of understanding or arrangements are in place or will be in place between the Government and the relevant foreign government or international organisation, as are necessary to enable such cross border project.
- (5) A determination contemplated in this Regulation is binding on the buyer and the procurer.

## **7. Procurement process under the IPP procurement programme**

- (1) Subject to any determination by the Minister in terms of section 34 of the Act as to the form of an IPP procurement programme, such IPP procurement programme shall take the form determined by the procurer.
- (2) The procurer shall in the appropriate procurement documentation specify any qualification and evaluation criteria applicable to that IPP procurement programme.
- (3) Where the procurer in respect of a new generation capacity project procured under an IPP procurement programme is not the buyer, the buyer shall not itself conduct a procurement process.

## **8. Cross border projects**

- (1) Where a section 34(1) determination requires or contemplates that new generation capacity be established through a cross border project, as contemplated in regulation 6(4), the applicable IPP procurement programme may, but need not necessarily, have the sole purpose of procuring new generation capacity from beyond the borders of the Republic.
- (2) The procurement process in respect of a cross border project shall be conducted with due regard to any agreements, memoranda of understanding or arrangements referred to in regulation 6(4).

*(Regulation 8(2) substituted by regulation 6 of Government Notice R1366 in Government Gazette 40401 dated 4 November 2016)*

## **9. Concluding the power purchase agreement**

- (1) A power purchase agreement between the buyer and an IPP must meet the following requirements -
  - (a) value for money;
  - (b) appropriate technical, operational and financial risk transfer to the seller;

*(Regulation 9(1)(b) substituted by regulation 7(a) of Government Notice R1366 in Government Gazette 40401 dated 4 November 2016)*

- (c) effective mechanisms for implementation, management, enforcement and monitoring of the power purchase agreement; and
- (d) satisfactory due diligence in respect of the buyer's representative and the proposed seller in relation to matters of their respective competence and capacity to enter into the power purchase agreement.

*(Regulation 9(1)(d) substituted by regulation 7(b) of Government Notice R1366 in Government Gazette 40401 dated 4 November 2016)*

- (2) Before the buyer concludes a power purchase agreement, the buyer or the procurer must, subject to any approvals required in terms of the PFMA -
  - (a) ensure that the power purchase agreement meets the requirements set out in sub-regulation (1);
  - (b) ensure that the buyer has a contract management plan that explains the capacity of the buyer, and its proposed mechanisms and procedures, to effectively implement, manage, enforce, monitor and report on the power purchase agreement and any other agreements relating to a new generation capacity project to which the buyer is a party, to National Treasury and the Minister on a regular basis; and
  - (c) put in place arrangements to ensure that any portion of the buyer's allowable revenue approved or allocated by the Regulator for purposes of implementation of new generation capacity projects will be used solely for the purpose of ensuring that the buyer's financial obligations in respect of new generation capacity projects will be met.
- (3) Should the Minister determine, as contemplated in regulation 6(3), that Eskom should establish new generation capacity as part of its services as the national electricity producer, Eskom will be required to enter into a power purchase agreement with the buyer, unless Eskom itself is the buyer.

## **10. Cost recovery**

The Regulator shall, when determining licence conditions relating to prices, charges and tariffs, ensure that the buyer is able to recover, at least, the full amount of the costs incurred by the buyer in the following categories:

- (a) all payments made for the purchase of new generation capacity, in terms of a power purchase agreement entered into in terms of or as contemplated in these Regulations;
- (b) all amounts paid by the buyer in terms of the power purchase agreement (other than those referred to in paragraphs (a) and (e)), provided that the buyer shall have acted efficiently in the



exercise of those rights and the fulfilment of those obligations in terms of the power purchase agreement which gave rise to such payments;

- (c) the efficiently incurred costs of the buyer in performing any function contemplated in these Regulations;
- (d) the efficiently incurred costs of the buyer in administering power purchase agreements;
- (e) costs of, and amounts paid by the buyer arising from the termination of a power purchase agreement; and
- (f) all other costs efficiently incurred by the buyer in participating in an IPP procurement programme and in purchasing new generation capacity through new generation capacity projects, including, without limitation, operating expenditure, professional fees and hedging costs.

## **11. Exemptions**

The Minister may, where justifiable having regard to all the circumstances and subject to any terms and conditions that he or she considers appropriate, exempt any person whether in relation to a specific new generation capacity project or in general, from complying with any or all of the provisions of these Regulations.

## **12. Transitional provisions**

- (1) The provisions of these Regulations do not apply in the case of any project relating to the electricity generation capacity listed under "Current Programmes" in the table titled IRP 1 in Schedule A to GN 25 of 29 January 2010: Determination regarding the integrated resource plan and new generation capacity, save for the electricity generation capacity listed as REFIT.
- (2) Notwithstanding sub-regulation (1), regulation 10 shall apply to the Peaker Project.

## **13. Repeal**

These Regulations repeal the Regulations published under GNR. 721 dated 5 August 2009 in *Government Gazette* 32378.